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MM Docket No. 93-25

## Direct Broadcast Satellite Public Service Obligations

## REPLY COMMENTS OF DAETC, *et al.*

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## SUMMARY

Despite the DBS industry's enormous growth and increase in technical capabilities over the past four years, their comments evidence little change from those filed in 1993. DBS providers still:

- oppose public interest obligations beyond the bare minimum required under Section 25(a);
- ask that the political broadcasting requirements of Section 25(a) apply only to candidates for national office;
- insist on maintaining unlawful editorial control over Section 25(b) programming;
- ask that the Commission require that only 4% of its capacity be reserved for educational and informational programming;
- urge the Commission improperly to include joint and common costs such as the cost of construction, launch and operation of the satellite in the definition of "direct costs."

The DBS providers' comments are most remarkable for their failure to acknowledge the plain language of Section 25 of the 1992 Cable Act. No matter how much DBS providers might prefer to have broad discretion over the political broadcasting requirements set out in Section 25(a) and the capacity set-aside requirements set out in Section 25(b), Congress has expressly ***declined*** to afford them such discretion.

DBS providers oppose meeting extra public interest obligations under Section 25(a) because they claim the industry is still "nascent." But the relevant inquiry is whether the industry has, or will soon have, the capability to provide a full panoply of public service. The tremendous growth of the DBS industry and new compression technologies, which DBS providers themselves proclaim, will increase DBS capacity and make the provision of extra public service benefits realistic and inexpensive.

At the same time, the DBS industry demands that the Commission diminish its statutory

minimum obligations of providing reasonable access and equal opportunities to eligible candidates. But Section 312(a)(7) prohibits a flat ban on access for all federal candidates but those seeking national office, and also prohibits placing candidate ads on segregated channels. And Section 315's guarantee of *equal* opportunities prohibits a DBS provider from denying a candidate access to the same channel or similar audience demographics it has provided to his opponent. If DBS providers willingly entered into programming contracts that constrain their ability to control sales of advertising time, the Commission should preempt them for now, and forbid them in the future.

Despite the plain language prohibition on editorial control over Section 25(b) programming, DBS providers continue to claim the right to select programming, either on their own or after it has been declared eligible for carriage by a non-profit "clearinghouse." But the plain meaning of the term and the legislative history of the cable leased access law, which contains identical language, make clear that a DBS provider that has any power over whether a particular program or programmer gains access to 25(b) capacity is inevitably exercising editorial control. A "clearinghouse" that is voluntary, permits DBS providers to select programming, and/or has more than 10% industry representation on its governing board, also runs afoul of the prohibition.

DBS providers' proposals to define what constitutes "direct costs" under Section 25(b)(4) is similarly incompatible with the statutory language. They ask the Commission to include, *inter alia*, costs such as those to construct, launch and insure the satellite. But these are "joint and common costs" which would remain even if there was no set-aside. Their inclusion is contrary to the express Congressional directive that direct costs cover "*only* the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite."

Consistent with their plea that anything but minimal regulation will harm their "nascent" industry, DBS providers ask the Commission to require only the minimum 4% set aside under

Section 25(b), and to apply the set aside only to video channels. But the with advent of new compression technologies, imposition of a 7%, as opposed to 4%, obligation on DBS systems with 100+ channels will hardly be burdensome. Nor has the industry provided a legal or policy basis why the set-aside should be limited only to video channels.

This set-aside should be measured in full channels, and not, as the DBS providers suggest, by using a "time/hour equivalency basis." The latter method would permit DBS providers to count scattered noncommercial programming they already offer, even if that channel also carries non-qualifying programming. This runs afoul of Section 25(b)'s express requirements that *channel* capacity be set-aside and that a DBS provider not have editorial control. Discrete channels would also make Section 25(b) programming easier to locate.

The industry's assertion that "National Educational Programming Suppliers" (entitled to discounted rates) and other for-profit programmers (not so entitled) are eligible to use the set-aside is an untenable reading of Section 25(b). Neither the plain language nor the legislative history demonstrate that Congress intended to broaden the eligible class of users. And Section 25(b)(5) makes clear that the discount is mandatory "for *any* channel" under Section 25(b).

Several of the DBS providers ask the Commission for a two year phase-in of their Section 25(b) obligations. In light of the four year delay in this proceeding and the fact that the DBS providers have been on notice of these requirements since the 1992 Cable Act was passed, this request is unconscionable. Forty-five days is all that is needed for the industry to prepare.

Finally, to the extent that a DBS provider carries over-the-air broadcast signals, the Commission should apply the same regulations governing such carriage on cable. It should also apply the program access rules to vertically-integrated DBS providers. But the Commission should decline the cable industry's bid to saddle DBS with other regulations that were specifically intended to curb cable's monopolistic abuses and to promote potential competitors like DBS.

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket No. 93-25
Protection and Competition Act	)	
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

**REPLY COMMENTS OF DAETC, *et al.***

By Media Access Project, their attorneys the Denver Area Educational Telecommunications Consortium, Inc., A\*DEC, American Psychological Association, Association of Independent Video and Filmmakers, the Benton Foundation, Center for Media Education, Peggy Charren, Community Technology Centers' Network, Consumer Federation of America, Minority Media and Telecommunications Council, National Association of Elementary School Principals, National Association of School Psychologists, National Federation of Community Broadcasters, National Writers Union, Office of Communication of the United Church of Christ, Public Access Corporation of the District of Columbia and Self Help for Hard of Hearing People (DAETC, *et al.*) respectfully submit these reply comments to selected comments filed in the above docket. These reply comments primarily respond to arguments made by the DBS<sup>1</sup> and cable industries regarding the scope of DBS providers' public interest obligations under Section 25 of the 1992

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<sup>1</sup>The vast majority of the DBS providers' comments make similar arguments. DAETC, *et al.* will therefore address them collectively, but indicate differences when necessary. The DBS industry commenters to which these replies are addressed include American Sky Broadcasting, LLC (Sky Broadcasting), DIRECTV, Inc. (DIRECTV), United States Satellite Broadcasting Company, Inc. (USSB), Primestar Partners LP (Primestar), Satellite Broadcasting Communications Association of America (SBCA) and TEMPO Satellite, Inc. (TEMPO).

Cable Act.

## INTRODUCTION

No commenter in this proceeding disputes that there has been a dramatic and dynamic change in the DBS industry since the time the FCC first initiated a proceeding to implement Section 25 of the 1992 Cable Act. In just four years, the number of operating DBS providers has risen from 1 to 5 and the number of subscribers from a few thousand to over 4.5 million. Analysts and the industry itself predict that the number of subscribers will, *at the very least*, triple by the year 2000. *E.g.*, Sky TRENDS Annual Report at 6 (DIRECTV projects 10 million subscribers; Primestar nearly 6 million); Direct Broadcast Satellite, Probe Research, Inc., April 1997 (from Internet homepage) (DBS subscribership projected to grow to 14.26 million by the year 2000). All but one of these systems currently provide over one hundred channels each, and new compression technologies are expected to increase those numbers, at a minimum, two and three-fold. Most importantly, the DBS industry has shown that it will be able to compete in the multichannel video market.

Yet even in the face of this record, the DBS industry acts as if it were lost in a time warp. Its approach to Section 25 is, for the most part, no different than it was 4 years ago. Notwithstanding DBS's proven marketability, and its increased technological capabilities, the industry's comments reflect no real change in position. As it did in 1993, the DBS industry, *inter alia*,

- opposes public interest obligations beyond the bare minimum under Section 25(a);
- asks that the political broadcasting requirements of Section 25(a) apply only to candidates for national office;
- insists on maintaining unlawful editorial control over Section 25(b) programming;
- asks that the Commission require that only 4% of its capacity be reserved for

educational and informational programming;

- urges the Commission improperly to include joint and common costs such as the cost of construction, launch and operation of the satellite in the definition of "direct costs," which will determine the affordability of access to the reserved channels.

The only new thinking the industry has done is to suggest that a nonprofit "clearinghouse" be formed for the purpose of determining what programming qualifies as "educational and informational" under Section 25(b). However, the industry still insists on maintaining the power to select from among the programming screened by the clearinghouse, and also wants the option not to use a clearinghouse at all. This would fall far short of complying with the plain language prohibition on a DBS provider maintaining editorial control over 25(b) capacity.

As was the case four years ago, the industry's comments are most remarkable for their steadfast refusal to acknowledge the plain language of Section 25. DAETC, *et al.* discuss these dictates at pp. 5-6 of their comments. Some DBS providers, most notably the industry's trade association (SBCA) and USSB, continue to refuse to acknowledge that Section 25 has two distinct and separate requirements. Section 25(a) permits the FCC to impose, in addition to the political broadcasting requirements, public interest programming requirements over which a DBS provider has editorial control, and which may include commercial programming. Section 25(b) requires DBS programmers to reserve capacity for noncommercial educational or informational programming over which DBS provider editorial control is expressly prohibited. As hard as SBCA and USSB try, these two provisions cannot be lumped into one "public service" requirement.

Most of the industry commenters ask the Commission to grant them the same discretion that over-the-air broadcasters have over programming. But the fact is, for the political broadcasting requirements of Section 25(a) and the capacity set-aside requirements of Section 25(b),

Congress has expressly *declined* to afford such discretion to DBS providers. No matter how inconvenient these requirements might seem to these licensees, they remain the law of the land.

**I. The DBS Industry Has the Capability to Take on Added Public Interest Obligations Under Section 25(a).**

The DBS Industry universally urges the Commission to impose no public interest obligations beyond those that are specifically set out in Section 25(a), *i.e.*, reasonable access and equal opportunities requirements. *E.g.*, Sky Broadcasting Comments at 9; USSB Comments at 3; Primestar Comments at 11-12. Their rationale for this argument is merely that the DBS industry is still "nascent." *E.g.*, DIRECTV Comments at 19; Sky Broadcasting Comments at 9; USSB Comments at 10.

The relevant question here is not whether the industry is "nascent," but whether the industry has, or will soon have, the capability to provide a full panoply of public service. As DAETC, *et al.* discussed in their comments at pp. 5-6, the tremendous growth the DBS industry has experienced over the past four years has demonstrated that it will survive, and thrive, in a multichannel video environment. And new compression technologies will expand DBS capacity to such an extent that provision of extra public service programming will hardly make a dent in DBS providers' bottom line, and indeed, may *increase* subscribership. This growth, viability and capability should be the benchmark by which the Commission decides whether the DBS industry can provide more public service, not, as some have argued, whether DBS has achieved parity with cable. SBCA Comments at 2; DIRECTV Comments at 3.

Indeed, the industry's own words support the view that DBS's subscribership and capacity has, and will continue to grow. The industry's trade association, SBCA, proudly states that "DBS has grown rapidly since its inception in 1994 and is providing increasing competition to the cable

industry." SBCA Comments at 2. DIRECTV points to "rapid development and deployment of DBS by multiple providers over the past three years," claiming that "DBS subscribership has increased substantially to the point that DBS systems have a higher combined subscribership than any other MVPD alternative to incumbent cable systems." DIRECTV Comments at 2-3. And Sky Broadcasting boasts that

[i]n the four years since Section 25 was enacted, the DBS industry has undergone dramatic and dynamic change. At the time the Commission initiated this proceeding, not a single Part 100 DBS license had commenced operations, and the lone service provider operating from a satellite licensed under Part 25...offered only eleven channels of programming. Now there are five Part 100 licensees and two operators providing DBS service from Part 25 Ku-band satellites, offering hundreds of channels of digital-quality video programming to customers nationwide. In the last year, the United States has negotiated a DBS/DTH Protocol with Mexico laying the groundrules for cross-border service and has initiated a proceeding to adopt rules for service from other foreign-licensed satellites....The Commission has also authorized U.S. licensed satellites to provide international DBS service to other countries. *The continuing rapid development of DBS service will challenge the Commission in implementing the statutory mandates of Section 25 that were adopted in a different era.*

Sky Comments at 3-4 [Emphasis added].

In the face of this success, and the industry's own optimism, it is impossible to maintain the claim that adding public service obligations will harm the industry's viability. Contrary to what DIRECTV claims, DAETC, *et al.*'s suggestions for programming are not, "excessive or unrealistic" for DBS provide to furnish. DIRECTV Comments at 2. *See* DAETC, *et al.* Comments at 7.<sup>2</sup> Indeed, they already provide some of this programming, like CSPAN and

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<sup>2</sup>DAETC, *et al.* also asked the Commission to apply the EEO obligations of 47 USC §554 to DBS. DAETC, *et al.* Comments at 7. It appears, however, that the Commission already did so when it extended its EEO rules to other MVPD's, including DBS, in 1993. 47 CFR §76.71(a). *See* Time Warner Comments at 48. The Commission should take the opportunity in this docket to ratify that decision.

Encore Media's WAM! *See, e.g.*, Primestar Comments at 21-23; Encore Media Comments at 2-3.

**II. Candidate Access Under Section 25(a) Should Not Be Limited to National Candidates or Segregated Channels.**

At the same time that the DBS industry insists that the Commission should not add any new public interest obligations under Section 25(a), it also demands that the Commission diminish its minimum obligations under that same section, *i.e.*, reasonable access for candidates under Section 312(a)(7) of the Communications Act and equal opportunities pursuant to Section 315 of the Communications Act. As discussed below, and in DAETC, *et al.*'s Comments at 8-10, Sections 312(a)(7) and 315 do not permit cherry-picking either eligible candidates or program channels.

**A. Section 312(a)(7) Requires Access for *All* Federal Candidates, not Just Candidates for National Office.**

The DBS industry commenters ask the Commission to interpret Section 25(a) to limit their Section 312(a)(7) obligations to access for "national" candidates. *E.g.*, TEMPO Comments at 17; Primestar Comments at 8; Sky Comments at 6. Much like DIRECTV, they claim that permitting all federal candidates access to their capacity would "impose an unreasonable and onerous burden on DBS providers...." DIRECTV Comments at 19. *See* Primestar Comments at 8.

But the law does not confer discretion upon the Commission to limit DBS providers' obligations merely to national candidates. The plain language of Section 25(a) requires the Commission to apply the access requirements of Section 312(a)(7), not just a small portion of those requirements, to DBS providers. Section 312(a)(7) requires broadcasters

to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting stations *by a legally qualified candidate for Federal elective office*

on behalf of his candidacy.

47 USC §312(a)(7) [Emphasis added].

Thus, under the plain language of Section 25(a), the Commission must require DBS providers to allow for reasonable access by *any* legally qualified candidate for federal office. Barring all but national candidates from gaining access certainly would not stand the "test of reasonableness" required under the statute. See *Licensee Responsibility Under Amendments to the Communications Act Made By the Federal Election Campaign Act of 1971*, 47 FCC 2d 516 (1974) (1974 Public Notice).

Nor does the existence of any alleged burden absolve DBS providers of their duties under Sections 312(a)(7). As discussed at pp. 8-10, *infra*, Section 312(a)(7) requests must be considered on a case-by-case basis, placing the candidate's needs first. While broadcasters may take into account whether there is a "multiplicity of candidates" which precludes granting all requests for time, *Carter-Mondale Presidential Committee*, 74 FCC 2d 631 *recon denied*, 74 FCC2d 657 (1979) *aff'd sub nom.*, *CBS, Inc. v FCC*, 453 U.S. 367 (1981) and "the disruptive impact on regular programming," a specific request for access may cause, *CBS v. FCC*, 453 U.S. at 387, it may not "adopt uniform policies regarding requests for access" in making the determination whether access is reasonable. *Id.*

In *Carter-Mondale*, NBC argued that it should be able to impose a blanket policy of refusing all requests for one-half hour blocks of time because there were a total of 122 candidates seeking the presidential nomination, and they each might desire access. The Commission found that NBC's refusal to sell the requested time was unreasonable because "it is highly improbable that all of the 122 candidates who have filed with the Federal Election Commission will have

the financial resources necessary to purchase a half hour of network prime time." *Carter-Mondale*, 74 FCC2d at 647.

The same logic applies here. Primestar aptly points out that "it is highly unlikely that federal candidates other than Presidential and Vice Presidential would have a serious interest in obtaining nationwide access to voters on such a dispersed basis." Primestar Comments at 8. Sky Broadcasting shares this view. Sky Comments at 6. Because DBS systems are national, federal candidates seeking the support of their districts or states would have relatively little use for such access. Primestar Comments at 8 n.5. The fact that DBS penetration is likely always to be low relative to over-the-air TV and local cable will also limit these candidates' desire to use the DBS medium to speak to voters. If federal candidates other than Presidential candidates sought access, they would most likely be limited to Senatorial candidates in extremely large states such as California or Texas. In those cases, it might be unreasonable to deny access, especially if a DBS provider is supplying regional spot beams. But any fear that hundreds of federal candidates will be seeking access is wholly illusory.

**B. Sections 312(a)(7) and 315 Prohibit a DBS Provider From Placing Political Ads on Segregated Channels and Denying a Candidate Access to the Audience He Wishes to Reach.**

The DBS providers seek a Commission ruling that would permit them to place political advertisements on segregated channels. They also ask the Commission to hold that they may deny candidates access under Section 315 to the same channel (or one with similar audience demographics) they have provided to opposing candidates. *E.g.*, TEMPO Comments at 18-19; Sky Comments at 6-7; Primestar Comments at 9-10. Such discretion, USSB claims, would give DBS operators "the same latitude to exercise good faith judgment in political programming as

is afforded broadcasters." USSB Comments at 9. *See* SBCA Comments at 17.

But discretion accorded broadcasters under Sections 312(a)(7) and 315 is not so broad as to permit the result the DBS providers seek. As discussed below, Section 312(a)(7) prohibits broadcasters from adopting rigid access policies - including limiting candidates to discrete channels. And denying a candidate access to the same audience demographics as their opponents would also violate the plain language requirement of Section 315 that candidates receive *equal* opportunities to present their viewpoints.

**1. Placing Candidates Only on Segregated "Candidate" Channels Violates Section 312(a)(7).**

Contrary to the DBS providers' suggestion that broadcasters are permitted broad discretion with respect to the sale of political advertisements, the primary consideration under Section 312(a)(7) is a candidate's perception of her needs. *CBS, Inc. v. FCC*, 453 U.S. at 389. While a broadcaster may consider certain other factors in giving access under Section 312(a)(7), such as availability of certain classes of time and the number of candidates, the law is clear that it may not adopt a rigid policy restricting access. *Commission Policies in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC2d 1079, 1090 (1978). Instead, broadcasters are required to examine each request for access on an individualized basis, starting from a candidate's specific needs, and considering "Congress' intent to ensure candidates for Federal office adequate opportunity to fully present and discuss their candidacies and hence provide the voters with information necessary for the responsible exercise of their franchise." *Summa Corporation*, 43 FCC2d 602, 604 (1973); *1974 Policy Statement* at 517 ("In applying this test of reasonableness in particular cases, the Commission looks to the underlying policy of the legislation, as revealed by its legislative history."). The Supreme Court emphasized this case-by-case approach in *CBS*

*Inc. v. FCC:*

[E]ach request must be examined on its own merits. While the adoption of uniform policies might well prove more convenient for broadcasters, such an approach would allow personal campaign strategies and the exigencies of the political process to be ignored\*\*\*\*§312 assures a right of reasonable access to individual candidates for federal elective office, and the Commission's requirement that their requests be considered on an individualized basis is consistent with that guarantee.

*Id.* at 389 (1981) [Emphasis added].

A blanket policy that relegates candidates to a separate channel or channels undoubtedly runs afoul of Section 312(a)(7)'s candidate-centered view and its prohibition on rigid access policies.

**2. Denying Candidate Access to the Same or Similar Channel on Which His Opponent Appeared Would Violate Section 315.**

The DBS providers' proposal to refuse candidate access to the same or similar (*i.e.*, comparable audience size and demographics) channel on which his opponent appeared would be a denial of *equal* opportunities under Section 315. The operative principle of equal opportunities is non-discrimination. Thus, in adopting rules to implement Section 315(a), the Commission has provided:

*Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office, or subject any such candidate to any prejudice or disadvantage.

47 CFR §73.1941(e).

The importance of this directive was recently underscored in *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996). In that case, the Court rejected an FCC ruling that would have permitted a broadcaster to channel certain political advertisements to later hours if those advertisements

contained material the broadcaster deemed "harmful to children." The Court held that Section 315 was violated because channeling an advertisement to a time period that was different from that used by the opposing candidate would be discriminatory:

Finally, section 315(a)...requires that candidates be given "equal opportunities" to use a broadcaster's facilities. To satisfy this requirement, a broadcaster must "make available periods of approximately equal audience potential to competing candidates to the extent that this is possible." *Political Primer 1984*, 100 FCC2d at 1505. Because the equal opportunity requirements "forbid any kind of discrimination between competing candidates,"...channeling clearly implicates the equal opportunity provision of Section 315(a).

This is so because if a station channels one candidate's message but allows his opponent to broadcast his messages in prime time, the first candidate will have been denied the equal opportunity guaranteed by this section.

*Becker v. FCC*, 95 F.3d at 84.

The situation the DBS providers propose is no different - it could choose to favor one candidate with prime time access on CNN or ESPN, and "channel" the opponent to a lightly viewed "candidate channel," or a channel with few voting-age viewers, like the Disney Channel. Even if each channel had an equal audience size, the demographics certainly would not be the same - resulting in the kind of discrimination prohibited by Section 315.

**C. To the Extent that Programming Agreements Prohibit DBS Providers From Inserting Political Advertisements, the FCC Should Preempt Those Contracts and Prohibit Them In the Future.**

The only excuse DBS operators offer to justify their proposal to place political advertisements on separate channels and to deny candidates the audience of their choosing, is their assertion that program carriage contracts prohibit them from controlling sales of advertising time. *E.g.*, Sky Broadcasting Comments at 5; DIRECTV Comments at 20; Primestar Comments at 10.

No one forced DBS providers to enter into these contracts. The fact is that they have

chosen to accept these contractual limitations with the full knowledge that countervailing legal obligations might arise. The solution for this "problem" is simple. Where current contractual agreements prevent a DBS provider from giving a candidate reasonable access or equal opportunities, the Commission should preempt the contract to permit access. DAETC, *et al.* Comments at 9-10.<sup>3</sup>

Moreover, the "problem" is of limited scope. Even if DBS providers have entered into these contracts in the past, there is certainly no reason for the Commission to ratify these practices by allowing new contract inconsistent with the overriding obligations of Sections 312(a)(7) and 315. The Commission should also forbid future contracts between programmers and DBS providers that prohibit the latter from inserting advertisements in time slots normally reserved for cable operators to insert local advertising. *Id.*; See *James H. Doyle*, 38 RR2d 330, 331 (BB 1976) ("[W]here a licensee is mandated by statute or Commission regulation to offer a candidate an opportunity to purchase a specific period of time, a licensee may not avoid this obligation by alleging that this period is not available to the candidate because it has been 'sold out' to commercial advertisers.")

### **III. Section 25(b)'s Prohibition on a DBS Provider Exercising Editorial Control Prevents a DBS Provider From Choosing Programming or Programmers.**

The DBS providers' response to Section 25(b)'s prohibition on exercise of editorial control is to suggest the creation of a nonprofit "clearinghouse" that would determine whether certain programs would qualify for carriage under Section 25(b) as "noncommercial educational or

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<sup>3</sup>There is no logical reason why a DBS provider, which has the capacity to provide 312(a)(7) access to a candidate on a particular channel, would not have the capacity to provide equal opportunities to opposing candidates on that same channel.

informational." *E.g.*, SBCA Comments at 5-6; USSB Comments at 6; DIRECT TV Comments at 13-16. While formation of this clearinghouse is a step in the right direction, the DBS providers continue to insist on maintaining the ability to select, reject and even produce Section 25(b) programming. As discussed below, a DBS provider may have *no* control over the selection of programming under 25(b), nor may it have control over the operations of the clearinghouse.

**A. Section 25(b) Prohibits *Any* Editorial Control By a DBS Provider.**

In an effort to get around the plain meaning of Section 25(b), the DBS providers follow USSB's lead in asserting that the prohibition against a DBS provider exercising editorial control "does not prevent DBS providers from selecting programmers or the timing or placement of programming." USSB Comments at 5. *Accord* SBCA Comments at 7 ("each provider should make its own judgment on the programming mix which will best serve its subscriber base"); Sky Broadcasting Comments at 19 ("DBS providers should be entrusted with the discretion to determine the appropriate mix of programming that will enable them to present an integrated one-up that maximizes program quality and diversity...."); DIRECTTV Comments at 9 (choosing programs "generally does not rise to the level of editorial control"). Their interpretation would prohibit DBS providers only from editing the content of the programming itself.

But this crimped definition of editorial control flatly contravenes the plain meaning of the term. The essence of an editor's function is to select the material to be published or broadcast. Oxford English Dictionary (1969) ("One who prepares the literary work of another person, or number of persons for publication, by *selecting, revising and arranging* the material.") [Emphasis added.] See *Pennoyer v. Neff*, 95 US 714, 721 (1877) ("[t]he term 'editor'...usually included not only the person *who wrote or selected* the articles for publication, but the person who

published the paper and put it into circulation") [Emphasis added]. An argument that a newspaper publisher does not engage in "editing" when it declines to print an opinion piece or news story, or chooses to include the same cannot pass the "red face" test.<sup>4</sup> The case is no different here; a DBS provider with any power over whether a particular program or programmer gains access to 25(b) capacity is inevitably exercising editorial control.<sup>5</sup>

Nor can it be argued that Congress intended DBS providers to have any say whatsoever in selecting programming. Section 25(b) is modeled after, and employs the same words as, Section 612 of the Communications Act, which governs commercial leased access channels of cable systems. The phrase "shall not exercise any editorial control" was adopted as part of the 1984 Cable Act. *See* 47 USC §532(c)(2). In so doing, the House Commerce Committee made clear that "editorial control" included selection of programming:

A critical concern of the Committee's must be stressed at this juncture. The overall purpose of this section is to prohibit any editorial control by the cable operator *over the selection of programming* provided over channels designated for commercial leased access. *This prohibition...restricts the cable operator from considering the content of a proposed service, thus assuring that even indirect editorial influences do not permeate*

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<sup>4</sup>The portion of the U.S. District Court opinion which DIRECTV cites in support of its argument that "choosing which programs to carry, generally does not rise to the level of editorial control," DIRECTV at 9, actually supports DAETC, *et al.*'s position. In holding that CompuServe was not liable for a defamatory statement made in one of the news publications contained in CompuServe's "Journalism Forum," the court stated that, as a general matter, "[w]hile CompuServe may decline to carry a given publication altogether, in reality, *once it does decide to carry a publication, it will have little or no editorial control over that publication's contents.*" *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y.1991) [Emphasis added.] Thus, the court found that the *only* editorial control CompuServe did exercise over its electronic libraries was in choosing whether or not to carry a publication in the first instance.

<sup>5</sup>Obviously, this prohibition would also extend to DBS providers producing programming for use on Section 25(b) capacity. *See, e.g.*, Primestar Comments at 20 ("DBS providers should be afforded the flexibility to create and/or solicit on their own volition quality programming designed to satisfy [Section 25(b)].....").

*what the Committee intends to be content-blind, arm's length negotiations over access to the set aside channels.*

H. Rep. 98-934, 98th Cong., 1st Sess. at 51-52 (1984) [Emphases added].

The House Report language is the relevant legislative history for the meaning of the term "editorial control" because the Senate Bill did not contain a leased access provision. The final bill contained the House language virtually unchanged, including the exact prohibition on editorial control.<sup>6</sup>

Thus, the Commission must reject any notion that DBS providers can select or package programming either before, or after, it has been considered by the clearinghouse. As discussed below, those functions must be carried out by an entity outside of the DBS providers' control.

**B. Use of a Programming "Clearinghouse" To Select Programming Cannot Be Optional, Nor Can the "Clearinghouse" Be Controlled By the DBS Industry.**

The DBS providers unanimously endorse the concept of funding a non-profit "501(c)(3)" organization intended to screen eligible programming for the Section 25(b) capacity. *E.g.*, SBCA Comments at 5-6; USSB Comments at 6; DIRECT TV Comments at 13-16; Sky Broadcasting Comments at 20. DAETC, *et al.* recommended the creation of a similar nonprofit "Programming Consortium" that would screen, select, package and fund eligible programming. DAETC, *et al.* Comments at 18-20.

Unfortunately, the clearinghouse concept as conceived by the DBS industry has several

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<sup>6</sup>TEMPO's comparison of Section 25(b) to the "must carry" scheme of 47 USC §534 is flawed. See TEMPO Comments at 13 n. 23. Whether or not the Supreme Court declared the "must carry" scheme to be content neutral is completely irrelevant. Unlike Section 25(b), the must carry law does not contain an express ban on editorial control over local broadcast stations. Instead, where the number of local stations exceeds the required capacity, it permits a cable operator "discretion in selecting which such stations shall be carried on its cable system." 47 USC §534 (b)(2).

critical legal flaws, and each would enable a DBS provider to evade the prohibition on editorial control contained in Section 25(b). First, the DBS provider is not required to use a clearinghouse, and could choose to make editorial decisions itself in violation of Section 25(b). *E.g.*, Sky Broadcasting Comments at 20; SBCA Comments at 5; USSB Comments at 6-7. Second, the DBS providers' clearinghouse would function only as a screening mechanism for choosing what programming is noncommercial educational or informational programming, leaving to the DBS provider the ultimate discretion as to what programming would receive access. *E.g.* DIRECTV Comments at 14; SBCA Comments at 5; Primestar Comments at 19. As discussed above, this too, would violate Section 25(b). Finally, to the extent that some in the industry have suggested that 50% of the Board of Directors of the clearinghouse should consist of representatives of the DBS providers, DIRECT TV at 13, it again runs afoul of the express prohibition against DBS providers making content decisions about Section 25(b) programming.

As DAETC, *et al.* have suggested, any "clearinghouse" or "Programming Consortium" must not only be funded by the DBS industry, but its use must also be mandatory, and not voluntary.<sup>7</sup> To prevent DBS provider editorial control, the nonprofit organization would screen, select and package eligible programming based on the needs of each DBS provider. Importantly, the organization must be structured so that no more than 10% of its Board Members consist of representatives of DBS providers. Otherwise, the mandate against exercise of editorial control would be rendered a nullity.

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<sup>7</sup>DAETC, *et al.* do not ask the FCC to mandate that the industry use *one* clearinghouse or programming consortium. DBS providers could choose to each have their own clearinghouses, or could combine their efforts. But what is essential to any scheme is that they must effectively insulate themselves from exercising editorial control over Section 25(b) programming.

**IV. Direct Costs Are Limited to the Cost of Transmitting the Signal to the Uplink Facility and the Direct Costs of Uplinking the Signal to the Satellite, and Cannot Include any Joint or Common Costs.**

Section 25(b)(4) of the Act requires DBS providers to make the noncommercial capacity available at no more than 50% of "direct costs." The DBS providers urge the Commission to include in that calculation, *inter alia*, research and development costs, SBCA Comments at 15, proportionate costs of construction, launch and operation of the satellite, insurance, *e.g.*, DIRECTV Comments at 17; Sky Broadcasting Comments at 22; Primestar Comments at 25, and the proportionate share of any auction payment, Sky Broadcasting Comments at 22.<sup>8</sup>

As discussed in DAETC, *et al.*'s Comments at 23, including these joint and common costs is contrary to the express Congressional directive that "direct costs" be limited to only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite, " H.R.Rep. 102-628, 102nd Cong., 2nd Sess. at 125 [Emphasis added]. Including these costs is also contrary to the plain meaning of term. Direct costs are commonly defined to include those where "the cost element can be specifically traced to the finished product." Michael Schiff and Lawrence J. Beninger "Cost Accounting," (2d Ed. 1963) at 6-7. In other words, any costs that would have been incurred whether or not the DBS provider was required to set aside noncommercial capacity are not direct costs. Costs for research and development, construction, launch and operation of the satellite, insurance and the auction payment would be

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<sup>8</sup>Echostar urges that the "reasonableness inquiry" for determining prices, required under Sections 25(b)(3) and (4), should be used only "as a last resort" Echostar Comments at 7. Suffice it to say that this novel argument turns every law of statutory construction on its head.

incurred with or without the requirements of Section 25(b). Thus, they are not "direct costs."<sup>9</sup>

DAETC, *et al.* believe that, at most, the direct costs of delivering noncommercial programming over Section 25(b) capacity will consist of

- the capital and operating costs entailed in delivering noncommercial signals to interface with the inputs of the DBS operator's encoding and compression equipment;
- the cost of additional decoder authorizations occasioned by noncommercial use (if any); and
- program guide expenses entailed in listing noncommercial programming (if any).

These costs will likely be *de minimis*, and, as a result, will be consistent with Congress' intent to make this capacity affordable and widely available. See 47 USC §§335(b)(3) & (b)(4) (DBS providers must make capacity available "upon reasonable prices, terms and conditions"; prices cannot exceed "50 percent of total direct costs of making channel available"; Commission must "take into account the nonprofit character of the programming provider.")<sup>10</sup>

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<sup>9</sup>A second provision in the 1992 Cable Act provides additional support for this interpretation of direct costs as excluding joint and common costs. Section 623 of the 1992 Cable Act uses identical terminology in setting out guidelines for the Commission to ensure that rates for basic tier cable service are reasonable. In calculating reasonable rates, the Commission was required to take into account

- (ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier,....
- (iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined,...to be reasonably and properly allocable to the basic service tier.

47 USC §543(b)(2)(C)(ii-iii). The Conference Report stated that this language was intended "to ensure that the direct costs of providing non-basic cable services are not considered joint and common costs and are not recovered in the rates charged for basic cable service." H. Conf. Rep. No. 102-862, 102nd Cong., 2nd Sess. at 63 (1992).

<sup>10</sup>Some DBS providers ask the Commission to set rates at the maximum 50% of direct costs because to do otherwise would "jeopardize the continued growth and development of DBS." TEMPO Comments at 14; Sky Comments at 22 (50% maximum is needed because "DBS pro-

**V. Large DBS Systems Should Set Aside 7% of their Entire Channel Capacity, Not Limited to Video Channels.**

The DBS providers ask the Commission to decide that *all* DBS systems be required to set aside only 4% of their channel capacity for use under Section 25(b). *E.g.*, Primestar Comments at 13;<sup>11</sup> SBCA Comments at 4; TEMPO Comments at 5. Moreover, they ask that the only capacity that should be subject to this 4% rule is that used to provide video. *E.g.*, SBCA Comments at 11; DIRECTV Comments at 5-6, Sky Broadcasting Comments at 11; USSB Comments at 8. Their reason for seeking the minimum requirement under Section 25(b) mirrors its argument for keeping the industry's Section 25(a) obligations to a minimum - the DBS industry is still "nascent," and should not be burdened with anything above the bare minimum public service requirements. *E.g.*, Sky Broadcasting Comments at 13, DIRECTV Comments at 5; Primestar Comments at 13.

Actually, in most instances, SBCA, DIRECTV and Primestar propose to provide *less* than the minimum 4% required by the statute. SBCA Comments at 11; DIRECTV Comments at 6;

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viders are struggling to pay off the costs of satellite construction, launch, insurance and operation." ). But this assumes that DBS providers receive payment from programmers that use their channel capacity, and are therefore losing income by making these channels available at a discount rate. In fact, however, DBS providers *pay* for virtually all of the programming they offer. Thus, Section 25(b), rather than being a drain on DBS providers' bottom line, is an opportunity to get quality noncommercial educational and informational programming for *free*, or for a small fee paid by the programmer.

<sup>11</sup>Primestar boasts that "[a]s further justification for the 4% maximum,...as detailed in the Further Comments of SBCA, industry members are willing to commit to dedicate the full 4% of the reserved capacity from the onset of their obligations." Primestar Comments at 13. This would be no great gift from the DBS industry deserving of special dispensation. They are mandated, under Section 25(a), to reserve at least that much. Moreover, to the extent that SBCA asks the Commission for a two year phase-in before the "onset of [DBS providers'] obligations" the public is being done even less of a favor. *See* SBCA Comments at 13.